the transaction is either void or voidable in point of law, and all such grounds of defence or reply, as the case may be, as if not raised would be likely to take the opposite party by surprise, or would raise issues of fact not arising out of the preceding pleadings, as, for instance, fraud, limitation, release, payment, performance, facts showing illegality either by statute or common law, or Statute of Frauds."

This rule is marked with an asterisk and, according to the notes given in the preamble to our Rules of the Supreme Court, 1957, an asterisk indicates that it differs from the English rule similarly numbered.

In my view there is no doubt that the question of illegality had taken the opposite party by surprise and also that in this particular case that question had raised issues of fact not arising out of the preceding pleadings.

In view of the above I would consider that the proper course this Court should take would be to set aside the judgment of the trial Judge and order a new trial with liberty to the parties to file fresh pleadings. The costs of the appeal and the costs of the first trial should follow the event of the second trial.

Barakbah C.J. (Malaya) concurred.

Suffian J.: I am not happy about this appeal but having considered it with care, I respectfully agree that there should be a new trial with liberty to the parties to file fresh pleadings. I accordingly concur with the judgment of brother Azmi.

New trial ordered.

Solicitors: *Wan Mustapha & Co.*

DARUS v. PUBLIC PROSECUTOR

[A.Cr.J. (Ong J.) January 31, 1964]
[Ipoh — Criminal Appeal No. 103 of 1963]

Road Traffic—Private motor-car used as public service vehicle—When presumption may be used to establish the offence charged—Presumption of fact or law—Meaning of "in so far as it may be necessary" and "groundwork"—Road Traffic Ordinance, 1958, ss. 22(2), 74(1), 92(1) and 144.

The appellant was charged under sections 92(1), 22(2) and 74(1) of the Road Traffic Ordinance for using his motor car as a public service vehicle, for using the said car for a purpose for which the licence fee chargeable was higher and for using the said car without there being in force in relation to such user a policy of insurance in respect of 3rd party risks. At the trial uncontroverted evidence as to user of the vehicle was given by a police constable who stated that he observed the motor car for 14 days during which period the car was seen carrying 140 passengers on 47 occasions. The three passengers travelling in the car on the occasion for which the appellant was charged were also called as prosecution witnesses. These witnesses however contrary to their previous statements to the police denied that they paid or intended to pay the appellant for being carried in his car. On this evidence the learned Magistrate convicted the appellant on all three charges. It was argued on appeal, *inter alia*, that the verdict of the learned Magistrate was unreasonable having regard to the evidence and that the Magistrate misdirected himself in holding that there was adequate evidence to raise the presumption under section 144 of the Ordinance.

Held: as it was not shown that the decision of the Magistrate was wrong in law or against the weight of evidence the decision of the learned Magistrate should be upheld.

Per Curiam: "I declared in *Gan Chye Huat* (2) what I believed to be the guiding principle, that 'there must at all times be adequate groundwork before applying the presumption' and not indiscriminately, as in that case.

Now, what is this groundwork? Groundwork means a basis. The basis of any criminal prosecution, of course, is investigation, which results in evidence being produced to the Court, evidence of a particular fact or facts from which an inference of guilt or innocence can be drawn. The truth about section 144 is that the practical necessities of a trial have elevated a presumption of fact to the status of a presumption of law. Intrinsically the presumption remains an inference from facts. Such being the case the circumstances under which passengers come to be carried on a vehicle becomes a vital subject of inquiry before any prosecution. By groundwork I mean nothing more and nothing less than such investigation resulting in relevant evidence consistent with, not in rebuttal of, the presumption."

Cases referred to:—

(1) *Public Prosecutor* v. *Mohamed Yunus* noted [1963] M.L.J. 10.

(2) *Gan Chye Huat* v. *Public Prosecutor* [1962] M.L.J. 27.

(3) *Public Prosecutor* v. *Ong Hock Tuan* [1963] M.L.J. 10, 11.

CRIMINAL APPEAL.

B. G. Yeap (Miss) for the appellant.

Mohamed bin Ya'acob (Deputy Public Prosecutor) for the respondent.

Cur. Adv. Vult.

Ong J.: This is an appeal against the decision of the Magistrate at Bruas convicting the appellant on three charges, namely, under section 92(1) of the Road Traffic Ordinance, 1958, for using his private motor-car SF. 5202 as a public service vehicle, under section 22(2) for using the said motor-car for a purpose for which the licence fee chargeable was higher than the fee for the licence held, and under section 74(1) for using the said motor-car without there being in force in relation to such user such a policy of insurance in respect of third party risks as complies with the requirements of Part IV of the Ordinance. The appellant was sentenced to pay a fine of $150 on the first charge, $100 on the second charge and $100 on the third charge. The learned Magistrate also made an order disqualifying the appellant from holding a driving licence for 12 months and confiscating the car.

The grounds of appeal were (i) that the verdict was unreasonable having regard to the evidence, (ii) that at the close of the prosecution there was no case to answer, (iii) that the Magistrate misdirected himself in holding that

there was adequate evidence to raise the presumption under section 144 of the Ordinance, (iv) that even if such presumption had arisen, it had been rebutted by the evidence of the three passengers and (v) that the conviction resting on this presumption alone, apart from positive evidence, was wrong in respect of the second and third charges, because section 144 is confined in its application to proceedings for an offence under Part V of the Ordinance, that is to say, section 92(1) in this case.

Uncontroverted evidence as to user of the vehicle was given by P.C. Abdul Kadir. He stated that, on instructions from the O.C.P.D., he kept motor-car SF. 5202 under observation for 14 days from October 19, 1962 and noted its movements in and around Pantai Remis, with particular reference to the passengers carried on every such occasion, in his diary. During the 14 days ending November 1 the car was seen carrying a total of 140 passengers on 47 occasions,, and of these passengers 41 by actual count were Chinese. Keeping observation with this police constable was another, P.C. Baharuddin (P.W.2).

Three passengers found travelling in the car on the occasion for which the appellant was charged were also called as prosecution witnesses. They were Cheng Choi (P.W.3) a 26-year-old *fisherman*, who was the first passenger picked up in Panchor Village; Kong Yeen (P.W.5) a 51-year-old *woodcutter* who was waiting for public transport at Simpang Tiga when he saw the appellant passing and stopped him; and Ang Cheng Huat (P.W.6) a 72-year-old *goldsmith*, who was likewise waiting for public transport at Pengkalan Bharu and stopped the appellant for a lift to Pantai. Whatever they might have said in their statements to the police on November 2, 1962, these three witnesses denied, when giving evidence in court nearly six months later, that they paid or intended to pay the appellant for being carried in his car. The prosecuting officer, however, was far from conversant with practice in cases where a witness departs from his proof, and he did nothing. In consequence it has been argued strenuously by counsel for the appellant that the credit of the three passenger witnesses for the prosecution was never impeached and since they had been offered as witnesses worthy of credit, there was no case to answer at the close of the prosecution.

The learned Magistrate, however, had been of a different opinion, and it is clear, I think, that in taking such view, he had been impressed by the unchallenged evidence of the police constable as to the movements of the motor-car in question during the preceding 14 days which bore the same familiar pattern; that he did not in fact regard the three passengers as witnesses worthy of credit and that, in forming such opinion of them, he had been unfavourably impressed by the unsatisfactory explanation they had given for their alleged free lifts in the vehicle. I cannot say that, in taking the view he did of the evidence, the learned Magistrate was wrong. He had the advantage of personal observation of these witnesses and their demeanour.

From the evidence of these three passengers certain facts emerge which go to show that the Magistrate had ample reason for deciding to call on the defence. These three were strangers to one another and it is too extraordinary a coincidence that on a single trip all of them should have been picked up in the manner described. The fisherman *was asked* by the appellant whether he was going to Pantai and thus obtained his lift. Next the car *slowed down* when it approached the only two shops in Simpang Tiga. There the wood-cutter, who was waiting for public transport — and consequently at a recognised bus-stop — *stopped the appellant's car and entered it without a word spoken to the appellant.* Finally at Pangkalan Bharu the goldsmith hailed the car and *stopped it.* This witness said that he had travelled once previously in the appellant's car, he had wanted to pay the appellant 40 cents, but it had been refused; he had thought it was a taxi. Consequently, he alleged, on the day in question he had no intention to pay any fare as it had been refused before. I have no hesitation in rejecting such an explanation, as the learned Magistrate himself had done. The appellant's conduct that morning was indubitably that of a taxi-driver plying for hire. That the carrying of these three passengers was not due to accidental meeting with friends is shown by the fact that the goldsmith never pretended to be a friend. Furthermore, the carriage of 140 passengers during the preceding 14 days could by no stretch of imagination be ascribed to accidental meetings and compliance with requests by friends and relatives of the appellant for gratuitous transport, for which he was out of pocket to the extent of 1½ gallons of petrol daily, costing about $3.

In this connection I would observe that the prosecution in a case of this type generally seem to be under the impression that it has no option but to call the passengers as witnesses. That is not quite correct so long as evidence sufficient to raise the presumption under section 144 is produced, and the passengers are made available to the defence at the trial. Evaluation of their evidence, however, is a matter for the Court, and I must say it is a fallacy to argue that every passenger witness tendered by the prosecution *ipso facto* becomes a witness worthy of credit whose evidence must necessarily be accepted without question. Where witnesses give evidence contrary to their previous statements, their credit ought to be impeached under section 113

of the Criminal Procedure Code and section 155(c) of the Evidence Ordinance. When thus discredited it will be obvious that the defence cannot argue, as has been done in this case, that their evidence ought to be accepted at its full face value. Here the learned Magistrate was not prepared to accept the passengers as witnesses of truth, in the teeth of evidence as to what the appellant was systematically doing during the previous fourteen days. The same evidence also compels me to the conclusion that they were picked up in circumstances no different from the others. What took place during the previous 14 days was evidence, for the purpose of section 15 of the Evidence Ordinance, to prove that the meetings were not accidental and that it was the appellant's regular practice to pick up passengers. I have carefully considered the explanation of the appellant, that he had three acres of rambutan land which he used to visit daily and on the way he came across friends who asked for lifts. In my view, no rambutan land, or indeed any other fruit farm, calls for at least three regular visits a day, and $3 a day spent on petrol means a lot of mileage which was totally out of the question for visits confined to the fruit plantation. Casual pick-ups of 143 persons in 15 days is a story impossible to swallow.

In the result, therefore, I am satisfied on the whole of the evidence that the decision of the learned Magistrate was right and ought to be upheld. It has not been shown to my satisfaction that the decision of the Magistrate was wrong in law or against the weight of evidence. (see section 321 of the Criminal Procedure Code). Conviction on the first charge, on the evidence produced in this case, makes conviction on the other two charges inevitable, and I accordingly dismiss this appeal, and confirm the judgment sentence and order of the Magistrate.

Before concluding I feel I ought to make certain observations regarding what I said in two earlier cases on the presumption raised by section 144 of the Road Traffic Ordinance: *Public Prosecutor* v. *Mohamed Yunus* [1] and *Gan Chye Huat* v. *Public Prosecutor*.[2] In *Mohamed Yunus* a car owned and driven by a Malay was found carrying five passengers, four Malays and one Chinese. Their names and addresses were taken, and it was found that they all came from different localities, except for a Malay couple. The prosecuting officer called two police constables who testified that they stopped the car, found those five passengers being carried, and gave their respective names and addresses. The prosecution offered four of the passengers to the defence (they having attended Court on subpoena) and relied on the presumption under section 144, without calling any further evidence except as to the ownership of the vehicle. The prosecuting officer was, of course, clearly entitled to adopt this course and rely on the presumption because there had been "adequate groundwork" in the evidence before the Court for raising the presumption, namely, that of the five passengers four at least came from different addresses, that they were *prima facie* strangers to one another, and that one of them was a Chinese. Such evidence, common sense tells us, lays a reasonable and adequate foundation for applying the presumption. The Magistrate, however, unreasonably held that any presumption was "out of place, improper and of no practical value" because "the passengers were able to, and the prosecution must, make them state under what circumstances they were conveyed by the driver in his vehicle: whether for reward or otherwise" and therefore "there is no necessity and in fact no reason why the Court must presume something about them." He accordingly refused to apply the presumption and held that there was no case to answer. He clearly was not at liberty to ignore the written law. It was in the context of that case and the Magistrate's ruling that I said what was quoted by Azmi J. in *Public Prosecutor* v. *Ong Hock Thuan* [3] that "evidence that a vehicle licensed for private use only was carrying passengers or goods is sufficient to raise the presumption which the persons charged must rebut. The learned Magistrate is not at liberty to brush off an express provision in an Act of Parliament as not binding on him."

It must, however, be remembered that section 144 provides that "in so far as it may be necessary to establish the offence charged it shall be presumed etc." The words "in so far as it may be necessary" must have some meaning. Where circumstances render it neither just nor proper to raise the presumption, I do not think it can be said to be necessary or even expedient to do so. Hence it is not an absolute rule that the presumption must *ipso facto* arise every time "passengers are carried in a motor vehicle." Since passengers, in this age of motor transport, get into cars in an infinite variety of circumstances, common sense must be the guide as to when the Court should be asked to invoke the presumption. For this reason I declared in *Gan Chye Huat* what I believed to be the guiding principle, that "there must at all times be adequate groundwork before applying the presumption," and not indiscriminately, as in that case.

Now, what is this groundwork? Groundwork means a basis. The basis of any criminal prosecution, of course, is investigation, which results in evidence being produced to the Court, evidence of a particular fact or facts from which an inference of guilt or innocence can be drawn. The truth about section 144 is that the practical necessities of a trial have elevated a presumption of fact to the status of a presumption of law. Intrinsically the presumption remains an in-

ference from facts. Such being the case the circumstances under which passengers come to be carried on a vehicle becomes a vital subject of inquiry before any prosecution. By groundwork I mean nothing more and nothing less than such investigation resulting in relevant evidence consistent with, not in rebuttal of, the presumption.

I need not invent any hypothetical case by way of illustration of what I have stated above because *Gan Chye Huat* is a case in point. There, on June 7, 1961 at about 7.15 a.m. a detective police constable attached to the Railway C.I.D. at Singapore, while on duty at the Singapore Railway Station near the 3rd class booking office, observed the appellant walking about in a manner which the witness thought fit to describe as "loitering." He saw him speak to a Chinese couple who accompanied him to his car which was then driven away. This perfectly commonplace occurrence, which takes place daily in railway stations at the hours of arrival and departure of trains to and from this terminus, without any further evidence, was all the evidence that the detective considered necessary to ask for an arrest. His suspicions were wholly unwarranted in the case of clear evidence that the same car had never previously been seen at the railway station, and that the appellant had not been observed approaching or talking to other prospective paying passengers or otherwise conducting himself so as to suggest that he was touting for fares. The detective's evidence, at its highest, was a groundless suspicion. *"In these circumstances"*, I said, "the presumption under section 144(a) could not have arisen, since there was not the remotest excuse for resorting to it. There must at all times be adequate groundwork before applying the presumption." Resorting to the presumption in that case would be as unjustifiable as resorting to it again if, for instance, I were to send my driver to meet my friends in Kuala Lumpur Railway Station with whom my driver had no previous acquaintance. Was he liable to prosecution and to have the presumption invoked merely because he had to accost two strangers in the station who followed him to my car? Is not some evidence necessary at least beyond mere suspicion? Proper investigation would have shown whether the suspicion was well-founded or groundless.

In *Ong Hock Thuan* there was more than ample groundwork in the evidence of the prosecution to constitute the basis for invoking the presumption. Hence the learned Magistrate trying that case appears to have misunderstood the principle in *Gan Chye Huat* and Azmi J. quite rightly reversed him, if I may say so with respect.

I do not think there is any inconsistency, however, between *Mohamed Yunus* and *Gan Chye Huat*, as the latter merely draws a line between cases where the presumption may be properly invoked and cases where its abuse would result in an intolerable interference with the personal liberty of motor-car owners and drivers. In *Mohamed Yunus* the principle had been stated in terms which, though appropriate for that particular case, were too wide for general application. Hence the restrictive nature of the principle enunciated in *Gan Chye Huat*.

Appeal dismissed.

Solicitors: *Yeap & Yeap.*

WONG FOH HIN v. PUBLIC PROSECUTOR

[F.C. (Wylie C.J. (Borneo) Tan Ah Tah F.J. & Gill J.) February 5, 1964]

[Jesselton — Federal Court Criminal Appeal No. 23 of 1963]

Evidence—Admissibility of—Evidence of incestuous relationship with daughter—Evidence of bad character—Whether prejudicial effect outweighed evidential value—Discretion of judge—Evidence Ordinance (Sabah Cap. 43), ss. 8 and 54.

Criminal law—Murder.

The appellant was convicted of the murder of his daughter. Evidence was admitted at the trial of an incident 3 months before the daughter's death where the wife had complained to the village headman that the appellant had "interfered with his daughter and that the matter had been disposed of by the village headman stating that if this occurred again the matter would be reported to the police. On appeal the sole question was whether the evidence of the above incident and also evidence of a similar incident just before the daughter's death were properly admitted. It was contended for the appellant that (i) the evidence of the incidents which suggested an incestuous relationship between the appellant and his daughter amounted to evidence of bad character and was therefore inadmissible (ii) and alternatively if it was admissible the trial Judge should have exercised his discretion to exclude it on grounds that its prejudicial effect far outweighed its probative value.

Held: (1) the evidence of the incidents was admissible. It was not rendered inadmissible merely because it tended to show bad character or the commission of another offence;

(2) in this case as there was only circumstantial evidence of the murder, strong and convincing evidence of motive would probably have high evidential value. The trial Judge was therefore correct in not exercising his discretion in favour of excluding evidence of the incidents on the ground that its prejudicial effect would be out of proportion to its evidential value.

Case referred to:—

(1) *Makin* v. *Attorney-General of New South Wales* [1894] A.C. 57.

FEDERAL COURT.

E. L. B. Hawkin for the appellant.

Li Yu Ken (Miss) (Deputy Public Prosecutor) for the respondent.

Wylie C.J.: The appellant was convicted of the murder of his own daughter. On the day in question, 7th August, 1963, according to appellant's wife, appellant had told his daughter